Supreme Court, U. S.
FILED
JAN 13 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

—*v.*—

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR CERTIORARI FILED AUGUST 12, 1976
CERTIORARI GRANTED NOVEMBER 8, 1976

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

—*v.*—

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

INDEX

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

No. 241-775

STATE OF LOUISIANA

versus

HARRY ROBERTS

Indictment For VIO. R.S. 14:30

MINUTE ENTRIES IN CHRONOLOGICAL ORDER

* * * *

Wednesday, April 3, 1974

Pursuant to adjournment Court met this day at 10:15 A.M.

* * * *

The defendant appeared at the bar of the Court for arraignment, attended by counsel, Garland R. Rolling, Esq., who, on behalf of the defendant, after the bill of indictment was read aloud in open Court to the defendant and after counsel for defense waived the reading of the other bills of information, entered pleas of Not Guilty and was granted twenty (20) days in which to file special pleadings. The Court ordered a pre-trial conference set on May 1, 1974 and will then hear any motions on the said date.

* * * *

Wednesday, May 1, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

In Case No. 241-775, Garland R. Rolling, Esq., filed with the Court, an Application for Bill of Particulars and Application for a Lunacy Commission as to Present Sanity

of Accused, which motions the Court ordered received and filed. The Court granted the Application for a Lunacy Commission as to Present Sanity of Accused and appointed Dr. Gene Usdin to examine the defendant. Pre-trial conference as to all cases set for this day were cancelled.

* * * *

Thursday, May 30, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

Garland R. Rolling, Esq., filed with the Court a Prayer for Oyer of Any Written Statements or Written Confessions signed by Harry Roberts and any and All Grand Jury Minutes, which the Court ordered received and filed.

* * * *

Friday, June 14, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

The defendant appeared at the bar of the Court for hearing on Lunacy Commission attended by counsel, Garland R. Rolling, Esq. After lunacy hearing held this day, the Court ruled the defendant presently sane and able to stand trial and to understand the proceedings and to assist counsel, to which ruling of the court counsel for defense objected and reserved a bill of exceptions, all as noted by the Court Reporter. Counsel for the State filed with the Court answers to Prayer for Oyer and Application for Bill of Particulars, which the Court ordered received and filed. After hearing held this day the Court ruled the State's answer to Prayer for Oyer as good and sufficient in law, to which ruling of the Court, counsel for defense reserved a bill of exceptions, to paragraph #2, all as noted by the Court Reporter. After hearing held this day the Court ruled the state's answer to Bill of Particulars as good and sufficient in law, to which ruling of the Court, counsel for defense reserved a bill

of exceptions as to paragraphs 4 thru 11 and 13 thru 17, all as noted by the Court Reporter. The Court ordered this matter set for trial on August 12, 1974.

* * * *

Monday, July 1, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

Garland R. Rolling, Esq., filed with the Court a Motion to Suppress Identification, Motion to Suppress Revolver and Bullets, Application for Bill of Particulars and Prayer for Oyer, which motions the Court ordered received and filed and set the hearings on July 17, 1974.

* * * *

Monday, July 15, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

The Court ordered this matter cancelled from the docket of August 12, 1974 and reset for trial on September 10, 1974.

* * * *

Wednesday, July 17, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

The defendant was present at the bar of the Court for hearing on Motion to Suppress Identification, attended by counsel, Garland R. Rolling, Esq. Lawrence Centola, Jr., Assistant District Attorney was present representing the State, and filed with the Court the State's answer to Motion to Suppress Identification, Answer to Motion to Suppress Revolver and Bullets, Answer to Prayer for Oyer, Answer to Application for Bill of Particulars and Answer to Prayer for Oyer for Telephone Call, which answers the Court ordered received and filed. Counsel for defense filed with the Court a Motion to

Quash and Counsel for the State filed the State's Answer to Motion to Quash. After hearing held this day, the Court denied the Motion to Quash, to which ruling of the Court, counsel for defense reserved a Bill of Exceptions, all as noted by the Court Reporter. After hearing held this day on the Motion to Suppress Identification, the Court overruled the said motion, to which ruling of the Court, counsel for defense reserved a Bill of Exceptions, all as noted by the Court Reporter. During the said hearing, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. After hearing held this day the Motion to Suppress the Revolver and Bullets, the Court overruled the said motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. During the hearing counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. After hearing held this day on Prayer for Oyer, the Court denied the said motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. After hearing held this day on the Prayer for Oyer, the Court denied the said motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. After hearing held this day on the Bill of Particulars, the request was denied by the Court, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. After hearings held this day the Court ordered the trial of this case set on August 15, 1974 in lieu of August 12, 1974.

* * * *

Thursday, August 1, 1974

Pursuant to adjournment the Court met this day at 9:35 A.M.

* * * *

Garland R. Rolling, Esq. filed with the Court a Motion for Subpoena Duces Tecum, which the Court ordered received and filed and made returnable on August 15, 1974.

* * * *

Wednesday, August 7, 1974

Pursuant to adjournment Court met this day at 10:15 A.M.

* * * *

Garland R. Rolling, Esq. filed with the Court a Motion and Order to Disclosure of Any Favorable Evidence, Motion to Quash, Motion for Subpoena Duces Tecum #1, Motion for Subpoena Duces Tecum #2 and Motion to Continue, which motions the Court ordered received and filed and hearings are to be held this day. The defendant was present at the bar of the Court attended by counsel, Garland R. Rolling, Esq. and William Wessell, Assistant District Attorney who represented the State. After hearing held this day on the Motion and Order Disclosure of Any Favorable Evidence, Counsel for defense was satisfied with the State's Answers. After hearing held this day on the Motion to Quash, the Court denied the said motion, to which ruling of the Court counsel for defense reserved a Bill of Exceptions, all as noted by the Court Reporter. During the hearing Mrs. Roberts, the defendant's mother and Harry Roberts, the defendant, were duly sworn by the clerk and gave testimony, all as noted by the Court Reporter. The Court maintained the trial date as August 15, 1974.

* * * *

Thursday, August 15, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

Present: The Honorable Jerome M. Winsberg, Judge.

* * * *

Now into Court comes Harry Connick, Esq., District Attorney and William Wessel, Esq., Executive Assistant District Attorney, who prosecute for the State. The defendant was present and represented by Garland R. Rolling, Esq., who filed with the Court two (2) Subpoena Duces Tecum made returnable August 16, 1974 and Motion for Change of Venue, which the Court ordered received and filed. Counsel for defense stipulated as to

the form of Motion to Change Venue, all as noted by the Court Reporter. The Court took the Venue Motion under advisement and counsel for defense made an oral Motion for Continuance. The State objected. The Court denied the said motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Both sides being ready, the Court ordered the trial to begin. Edward D. Callan, Leonard E. Bendy, Michael F. Mesisco, Philip Burg, Alfred Normand, Edward W. Martin, Joseph W. Miller, Jr., Robert Nugen, Leonard Jos. McCaffery, George D. Severson, Charles Clyde Wells, and Hank R. Friedberg, were duly sworn accepted by both the State and defense and sworn to serve as jurors in this case. The State used nine (9) peremptory challenges and the defense used thirteen (13) peremptory challenges. Thirteen (13) jurors were excused for cause and twenty-nine (29) jurors were excused by consent. During the Voir Dire, counsel for defense reserved twenty-seven (27) bills of exceptions, all as noted by the Court Reporter. The Court granted the counsel one additional challenge for the purpose of choosing an alternate juror, to which counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Both counsel for the State and defense stated they were ready to proceed without an alternate juror. The Court then denied the Motion for a Change of Venue, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Counsel for the State filed a Notice of Intent to Use Inculpatory Statement, which the Court ordered received and filed. Outside the presence of the jury counsel for defense moved for permission of Mr. and Mrs. Roberts, parents of the defendant, to remain in Court during the proceedings. There being no objection by the State and no motion for sequestration by the State or defense, the Court granted the motion. In the presence of the jury the Bill of Indictment was read aloud in open court. Mr. Wessel made the opening statement in behalf of the State. Counsel for defense waived the opening statement. Theresa Dorsey was duly sworn by the clerk, testified on the part of the State and was

cross examined by defense. During the testimony of the said witness, Counsel for the State marked for identification S-1-S, a plastic bag, containing a pair pants, S-1-B, a plastic bag containing clothing, S-1-C, a plastic bag containing a red handkerchief, S-7, a pair of shoes, S-10, a revolver, S-17, a large photograph of the scene. Sylvester Saunders, Patrolman John P. Tobin, Frank M. Valleck, Lawrence Matherne, David Bass Williams, Herry Britton, Patrolman Merlin Lindsey, Sgt. Elmo H. Boepple, Theodore Constantine and Patrolman Richard Baumy, were duly sworn by the clerk, testified on the part of the State and each were cross examined on the part of the defense, with the exceptions of witnesses, Merlin Lindsey and Sgt. Elmo H. Boepple. During the testimony of Patrolman John P. Tobin, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. During the testimony of Patrolman John P. Tobin, Counsel for the State marked for identification, S-2, photograph, S-3, a photograph, S-4, a photograph and S-6, a photograph. During the testimony of Lawrence Matherne, Counsel for the State marked for identification, S-3, a photograph. During the testimony of Officer Merlin Lindsey, Counsel for the State marked for identification, S-8, a photograph and S-9, a photograph, and S-5, a photograph. During the testimony of Richard Baumy, Counsel for the State marked for identification, S-7-A, evidence tag. The Court then ordered the trial recessed until, Friday, August 16, 1974 at 9:00 A.M.

* * * *"

Friday, August 16, 1974

Pursuant to adjournment Court met this day at 9:00 A.M.

* * * *

(SECOND DAY OF TRIAL)

Having been continued from Thursday, August 15, 1974, the defendant was placed at the bar of the Court attended by counsel, Garland R. Rolling, Esq., for the further of the trial. Harry Connick, District Attorney and

William Wessel, Executive Assistant District Attorney were present and represented the State. Both sides being ready the Court ordered trial to resume. The jury was present and in their respective seats in the jury box. Patrolman Allen Tidwell, Mable Domingo, Patrolman James Doll, Wilma W. Clark, Patrolman Michael Daros, Patrolman Richard Marino, Criminalist Paul Wertz, Dr. Ronald Welch, William Gurvich, Patrolman Martin Alonzo, Dorothy Brumbfield, Patrolman Wayne H. Cooper, Criminalist Joseph DaPaoli, Patrolman Robert Townsend and Patrolman Daniel O'Neil were duly sworn by the clerk, testified on the part of the State and were cross examined by defense with the exceptions of Patrolman Allen Tidwell, Wilma W. Clark, William Gurvich and Criminalist Joseph DaPaoli. During the testimony of Patrolman James Doll, Counsel for the State marked for identification, S-18-A, IBM Card, S-18-B, IBM Card and counsel for defense and the State stipulated as to the Official copy of arrest register, marked for identification, D-1, all as noted by the Court Reporter. During the testimony of Patrolman Richard Marino, Counsel for defense marked for identification, D-2, a photograph, D-3, a photograph and D-4, a photograph. After the proper predicate had been laid, the Court ruled the Dr. Welch, as an expert in the field of pathology. During the testimony of Dr. Welch, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Also during the testimony of Dr. Welch, Counsel for the State marked for identification S-12, a spent pellet and S-11, autopsy Protocol. During the testimony of Dorothy Brumfield, Counsel for the State marked for identification S-11-A, process verbal, and offered filed in evidence S-11 and S-11-A. The Court ordered said exhibits admitted into evidence and counsel for defense reserved bills of exceptions, all as noted by the Court Reporter. During the testimony of Criminalist Joseph DaPaoli and after the State laid the proper predicate the Court ruled the said witness as an expert in the field of analysis of blood stains and in the identification of bullet holes, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court

Reporter. During the testimony of Patrolman Robert Townsend and after proper predicate had been laid the Court ruled the witness as an expert in the field of firearms identification, to which ruling of the Court counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Also during the testimony of the said witness, Counsel for the State marked for identification, S-14, test pellet and S-13, five (5) spent and one (1) live cartridge. During the testimony of Patrolman Daniel O'Neil, and after the State laid the proper predicate the Court ruled the witness as an expert in the field of fingerprinting identification, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Counsel for the State then marked for identification S-15, fingerprint slide, S-16, two (2) photographs of fingerprints identification, S-16-A, a photo print on left hand and S-16-B, photo print on right hand. Counsel for the State then moved to file in evidence, S-1-A thru 10, S-12 thru S-18-B and the Court ordered the said exhibits admitted into evidence, to which ruling of the Court, counsel for defense reserved twenty-one (21) bills of exceptions, all as noted by the Court Reporter. The State rests. The Court ordered a recess for lunch. In Chambers, without objection and with the defendant, his counsel, the defendant's parents and both Counsel for the State present, the Court admonished Mrs. Roberts as to the alleged complaints to the District Attorney, of threats upon witnesses, all as noted by the Court Reporter. The Court ordered the trial to resume in the Courtroom outside the presence of the jurors, at which time counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. The jury was returned to the Courtroom and in the presence of the jury, Joseph Newbrough, Felix Schillesci, Patrolman Richard Marino, Patrolman Lloyd Hoffmeister, Harry Roberts, Mr. Harry Roberts, Sr., Winetta Slack, Arlene Woods and Mrs. Harry Roberts, Sr, (recalled), were duly sworn by the clerk, testified on the part of the defense and were cross examined by the State with the exceptions of Joseph Newbrough, Patrolman Richard Marino, Patrolman Hoffmeister and Arlene

Woods. During the testimony of Joseph Newbrough, both Counsel for the State and defense stipulated as to the many photographs. Counsel for defense marked for identification D-5, 6, 7, 8, 9, 11, 10, 12, 13, 14, 15, 16, 17, 18 and 19. During the testimony of Felix Schillesci, counsel for defense marked for identification D-20, a large photograph and offered filed in evidence the exhibits D-2 through D-20. The State objected. The Court overruled the objection and ordered the said exhibits admitted into evidence. During the testimony of Harry Roberts, counsel for defense moved for a mistrial, which motion the Court denied to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. During the testimony of Mr. Harry Roberts, Sr., counsel for defense moved for the jury to view the exhibits D-2 thru D-20. There being no objections by the State, the Court ordered the jury to view the said exhibits. During the testimony of Winetta Slack, Counsel for the State marked for identification S-19, in globo, a letter. The Court ordered a recess. Outside the presence of the jury, counsel for defense called Dr. Joseph P. Breaux; no response and the defense requested the return on Dr. Breaud be read into the record. Counsel for the defense then made a Motion for Continuance to be supplemented in writing. The court denied the motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Counsel for defense made oral Motion to Continue due to the absence of the defense witness, John Luned, and the Court denied the motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. The jury returned to the Courtroom and in the presence of the defendant, his counsel and Counsel for the State, the Court ordered the trial resumed. Both counsel for the State and defense entered into stipulation as to the would be testimony of a hospitalized potential witnesses's testimony, Dorothy Snead. During the testimony of Arlene Woods, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. During the testimony of Mrs. Harry Roberts, Sr., counsel for

defense marked for identification and offered filed in evidence D-21, a mailgram. The State objected. The Court sustained the objection to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. The defense rests. In rebuttal, Lawrence Kenner, Ethel Harris, Pamela Batiste, Sally Ann Bradley, Delores Williams, Dorothy Saunders, Mable Domingo, Patrolman George Tolar and Patrolman Marcal David, Patrolman Bruce Hubbie, Lt. Robert Muth and Patrolman John Tobin, were duly sworn by the clerk, testified on the part of the State and were cross examined by defense with the Ptn. John Tobin, Ptn. Bruce Hubble and Ptn. George Tolar. During the testimony of Patrolman George Tolar, counsel for defense reserved two (2) bills of exceptions, all as noted by the Court Reporter. During the testimony of Officer Marcal David counsel for defense offered filed in evidence, D-1. The State objected and was sustained by the Court, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. During the testimony of Lt. Robert Muth, Counsel for the State marked for identification, S-21, rights of arrestee form. During the testimony of Patrolman John Tobin, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Also during the testimony of said witness, counsel for the State offered filed in evidence, S-20. Defense objected, was overruled, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. State rests. Counsel for defense moved to reopen defense case. The State objected. The Court denied the said motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. 6:15 P.M. Mr. Wessel made the closing argument to the jury on behalf of the State. 6:42 P.M. Mr. Rolling made the closing argument to the jury on behalf of the defense. 7:11 P.M. Mr. Connick made the rebuttal argument to the jury on behalf of the State. Counsel for the State filed with the Court a Request for Jury Instruction, which the Court ordered received and filed. 7:37 P.M. The Court

charged the jury as to the law pertaining to this case. 7:37 P.M. The Court charged the jury as to the law pertaining to this case. The Court granted the requested Charge No. and it was given to the jury. The Court denied the requested Charge No. 2 and No. 3, 8:11 P.M. The Jury retired to deliberate its verdict. 8:55 P.M. The Jury returned to the Courtroom and in the presence of the defendant, his counsel and Counsel for the State, returned the following written verdict:

"New Orleans, Louisiana, August 16, 1974, We, the jury, find the defendant, Guilty as Charged. (Signed) Hank R. Friedberg, Foreman." On motion by defense the jury was polled and it was found to be a legal verdict and the Court ordered the verdict recorded, thanked the jurors for their services and discharged them from this case. The Court ordered the matter set for sentence 9, 1974.

• • • •

Tuesday, September 3, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

• • • •

Garland Rolling, Esq. filed with the Court two (2) Written Motions for Continuance, which motions were filed orally during the trial of his case and denied. The Court ordered both motions received and filed. Counsel for defense then filed a Motion in Arrest of Judgment and a Motion for a New Trial, which motions the Court ordered received and filed and hearings set September 9, 1974.

• • • •

Monday, September 9, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

• • • •

Counsel for the Defendant, Garland Rolling, Esq., appeared at the bar of the Court and waived the presence of the defendant for the purpose of motions. Counsel for defense filed with the Court a Motion to Continue Sentencing and Motion in Arrest of Judgment and Motion for a New Trial, which motions the Court ordered received and filed. The Court granted the Motion for

Continuance and ordered the sentencing reset September 16, 1974. Counsel for defense then filed with the Court a Motion to Allow Harry Roberts Furlough From Jail to Attend His Father's Funeral, which motion the Court ordered received and filed and denied.

• • • •

Monday, September 16, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

• • • •

The defendant appeared at the bar of the Court for hearings on Motion In Arrest of Judgment and Motion for a New Trial, attended by counsel, Garland Rolling, Esq. After hearing held this day, the Court denied the Motion In Arrest of Judgment and Motion for a New Trial, to which rulings of the Court, counsel for defense reserved bills of exceptions, all as noted by the Court Reporter. Counsel for defense, before hearings, filed with the Court a Memorandum, which the Court ordered received and filed. The Court then ordered the sentencing continued and reset September 18, 1974.

• • • •

Wednesday, September 18, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

• • • •

The defendant appeared at the bar of the Court for sentence, attended by counsel, Garland Rolling, Esq. who filed with the Court a Motion for Continuance, which the Court ordered received and filed. Counsel for the State objected to the motion. The Court denied the motion to continue. The Court sentenced the defendant to be remanded to the Parish Prison to remain awaiting his removal to the Louisiana State Penitentiary at Angola to be executed. To be put to Death in the manner prescribed by law. Court costs waived. Counsel for defense filed with the Court a Motion for Appeal, which the Court ordered received and filed and made returnable November 18, 1974.

• • • •

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

Police Item No. 25259-74
B-25259-74
241-775

THE STATE OF LOUISIANA)
) ss
PARISH OF ORLEANS)

INDICTMENT

THE GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, PRESENT That one HARRY ROBERTS late of the Parish of Orleans on the TWENTY-SIXTH day of FEBRUARY in the year of our Lord, one thousand, nine hundred SEVENTY-FOUR with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans committed first degree murder of one, DENNIS McINERNEY contrary to the form of Statute of the State of Louisiana in such cases made and provided and against the peace and dignity of the same.

/s/ [Illegible]
District Attorney for the
Parish of Orleans

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 241-775 SECTION "C" DOCKET:

FILED: _____ _____
Deputy Clerk

STATE OF LOUISIANA

vs.

HARRY ROBERTS

MOTION TO QUASH DUE TO THE UNCONSTITUTIONALITY OF THE MURDER STATUTE

Now into court through his undersigned counsel comes petitioner, Harry Roberts, and files this Motion to Quash on the grounds that the statute under which the said Harry Roberts was indicted is in violation of the laws of the State of Louisiana and the United States of America and the indictment of the same has not in fact cured the unconstitutionality of the said statute.

/s/ Garland R. Rolling
GARLAND R. ROLLING
Attorney for Petitioner
319 Metairie Road
Metairie, Louisiana 70005
835-2543

ORDER

Let the District Attorney for the Parish of Orleans on the 17th day of July, 1974, at 10:00 a.m. show cause as to why the statute for murder under which Harry Roberts was indicted should not be held unconstitutional and the indictment dismissed.

New Orleans, Louisiana, this 17th day of July, 1974.

_____

Judge

Denied.

/s/ Jerome M. Winsberg
July 17, 1974

[Certificate of Service Omitted in Printing]

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
NO. 241-775, SECTION "C"

STATE OF LOUISIANA

vs.

HARRY ROBERTS

ANSWER TO MOTION TO QUASH

Now into Court comes the State of Louisiana, through the undersigned Assistant District Attorney for the Parish of Orleans, and for answer to the defendant's Motion to Quash, states that:

The State denies the allegations of fact and law contained in the defendant's Motion to Quash, and calls for strict proof thereof.

WHEREFORE, the State prays that its answer be deemed good and sufficient, and that defendant's Motion to Quash be denied.

/s/ Lawrence J. Centola, Jr.
LAWRENCE J. CENTOLA, JR.
Assistant District Attorney

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

TESTIMONY TAKEN AT TRIAL, AUGUST 16, 1974

(From *Trial* transcript in record, pp. 136-137)

MRS. HILDA W. CLARK, was called as a witness by the State; and after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESSEL:

Q What is your full name, please?
A Hilda W. Clark, Mrs.
Q Mrs. Clark, by whom are you employed, and in what capacity?
A I'm employed by the City of New Orleans and assigned to the New Orleans Police Department.
Q In any particular area?
A I'm in the payroll division; I'm an Account Clerk II.
Q Did you bring with you the payroll records of one, Dennis McInerney?
A I do; I have them.
Q Do those records reflect whether or not Dennis McInerney was an employed police officer with the New Orleans Police Department on February twenty-sixth, 1974?
A In my opinion, Yes, Sir.
Q Well, do the records reflect that?
A Yes, sir.
Q Do those records show the date of appointment of Dennis McInery?
A Yes.
Q And does it show any termination date?
A Yes.
Q What is the termination date?
A The twenty-sixth of February.

Q Does it show the reason for the termination?
A Deceased.
MR. WESSEL: I have no further questions.
MR. ROLLING: No questions.
THE COURT: Thank you. You can step down. You can go.

• • • •

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

• • • •

(September 18th, 1974—Sentencing)

THE COURT: Harry Roberts, the Jury in this case, duly empaneled and sworn, having found you guilty of murder as charged in the indictment and you having been first asked why the sentence of the law should not be pronounced upon you, it is hereby ordered, and it is the sentence of this Court, that you, Harry Roberts, be remanded to the Parish Prison of the Parish of Orleans, there to remain in the custody of the Criminal Sheriff of the Orleans, and there to remain awaiting your removal to the Louisiana State Penitentiary at Angola until the day and hour fixed by the Governor of the State of Louisiana for your execution, at which time and place to be designated by the Governor of this State in his warrant, you, Harry Roberts, shall then and there be put to death in the manner prescribed by law, that is, by causing to pass through your body a current of electricity of sufficient intensity to cause death and by the application and continuance of such current through your body until you are dead, dead, dead, and may God have mercy on your soul.

• • • •

SUPREME COURT OF LOUISIANA

March 29, 1976

No. 56952

STATE OF LOUISIANA, APPELLEE

v.

HARRY ROBERTS, APPELLANT

REHEARING DENIED MAY 14, 1976

Defendant was convicted in Criminal District Court, Orleans Parish, Jerome Winsberg, Jr., of first-degree murder, and sentenced to death, and he appealed. The Supreme Court, Tate, J., held that, inter alia, the prosecutor's reference to a juvenile offense by the defendant was cured by the judge's cautionary instruction; that pretrial oyer of a pistol and bullet was properly denied; and that the State was properly allowed to challenge for cause jurors who would not impose the death penalty under any circumstances.

Affirmed.

Summers, J., concurred in result and assigned reasons.

Dixon, J., dissented in part and concurred in part.

Calogero, J., concurred with reservation.

1. Witnesses—337(6)

It was improper impeachment of murder defendant's credibility for prosecutor to ask him if he had previously pleaded guilty in juvenile court to theft and shoplifting. LSA-R.S. 13:1580(5), 13:1586, 15:495.

2. Criminal Law—1170½(6)

Improper impeachment of defendant's credibility by prosecutor's question whether he had previously pleaded guilty in juvenile court to theft and shoplifting charges was cured by trial court's cautionary instructions to jury

after defendant's objection was sustained. LSA-R.S. 13:1580(5), 13:1586, 15:495; LSA-C.Cr.P. arts. 770, 771.

3. Criminal Law—1166(1)

First-degree murder conviction would not be reversed because of denial of opportunity for pretrial ballistic testing where such testing was not shown to have been relevant to any issue of accused's defense.

4. Jury—108

Record in first-degree murder prosecution showed no error in trial court's determination that, despite some initial ambiguity, veniremen disclosed that they would not impose death penalty under any circumstances and thus were properly discharged for cause. LSA-C.Cr.P. art. 798(2).

5. Jury—33(5)

Removal from jury service of 25 veniremen opposed to death penalty did not deprive defendant in first-degree murder prosecution of jury representative of people to which accused was constitutionally entitled. LSA-C.Cr.P. art. 798(2).

6. Criminal Law—339

In the first-degree murder prosecution for killing of police office, in-court identification of defendant by another policeman whom he had also shot was not tainted by chance face-to-face encounter between witness and defendant at hospital.

7. Searches and Seizures—3.3(4)

Police officers looking for wounded perpetrator of murder committed minutes before were entitled to follow bloody residue into alley within block of murder and to pick up abandoned pistol in plain view in alley.

8. Criminal Law—1213

Death penalty provided for first-degree murder was constitutional. LSA-R.S. 14:30.

Garland R. Rolling, Metairie, for defendant-appellant.

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TATE, Justice.

The defendant was convicted of first degree murder, La.R.S. 14:30 (1973), and sentenced to death. Upon his appeal, he relies upon seventeen assignments of error.

The most arguable contentions are raised by assignments 13, 15, and 17 (adopting the enumeration in the appellant's brief). These relate respectively to: the denial of a mistrial based upon the prosecutor's reference to a juvenile offense of the defendant; the denial of pretrial oyer of a revolver and bullets used in the killing for purposes of ballistic testing; and the excusing, upon the prosecutor's challenger for cause, of twenty-five jurors on the basis of their views relating to imposition of the death penalty.

Context Facts

The evidence of the state's witnesses proved:

At about 6:30 p.m. on Mardi Gras, 1974, the defendant Roberts became involved in a quarrel with his neighbors. Drawing a pistol, he fired blindly at them, striking a 13-year-old boy.

Responding to a radio call, Police Officers Tobin and McInerney arrived at the scene within minutes. Roberts was still in sight, about a block away. He was walking swiftly. The police officers followed him in their vehicle through the crowded carnival streets.

The police vehicle caught up with Roberts within three blocks. When the officers called to him, Roberts approached, pulled out a pistol and shot the driver Tobin as he was opening his door, and shot at Officer McInerney as he was descending from the passenger side. When McInerney fired back (hitting Roberts in the left leg), Roberts shot and killed the police officer.

Roberts left a trail of blood. He was located within a block of the shooting. He had broken into a home and had telephoned his mother to come for him.

The gun used in the killing was found at the rear of an alleyway by which Roberts had approached the home into which he had broken. His fingerprints were found on the weapon. Blood drippings were near the pistol, as they were at the entrance to the alleyway.

Roberts fought the arresting police desperately when they arrived at the house.

Roberts took the stand in his own defense. He admitted the neighborhood quarrel, but denied that he had used a gun (or that he had ever possessed one). He stated that, while leaving the scene, he had been shot in his leg by a party unknown.

Roberts admitted that he had gone down the alley to the house in which he was found. He indicated that his use of the telephone was with the consent of the home's inhabitants, in order to locate his mother and to inform the police of the shooting. (The inhabitants testified that Roberts had broken into their home through a side-door.)

The essence of the accused's defense was that some other man had shot the policeman a block or so away from the shooting of himself by a party unknown.

We do not find his assignments of error to have merit, for the following reasons:

Assignment 13: The prosecutor's reference to a juvenile offense

The accused took the stand in his own defense. Upon cross-examination, the prosecutor asked him if in 1970 he had pleaded guilty in juvenile court to theft and shoplifting. The district court sustained a defense objection to the question and admonished the jury to disregard the question.

[1] As the defendant points out, by express statutory provision, an adjudication that a juvenile has committed an offense is not a determination that the child was a criminal, "nor shall such adjudication be deemed a conviction." La.R.S. 13:1580(5) (1974). It was thus improper impeachment of the appellant's credibility, since only a *conviction* of a *crime* may be used for such purpose. La.R.S. 15:495. (Furthermore, juvenile records are

ordinarily privileged information. La.R.S. 13:1586 (1950).)

[2] The defendant contends that the admonition to the jury to disregard the prosecutor's question was insufficient to cure the prejudice resulting from the prosecutor's reference to the inadmissible juvenile offense. He contends that La.C.Cr.P. art. 770 mandatorily requires a mistrial when the prosecutor "refers directly to . . . another *crime* committed or alleged to have been committed by the defendant *as to which evidence is not admissible.*"

The mandatory mistrial required by the code article within its literal terms includes only improper references to "crimes", not to juvenile adjudications. While, as the trial court held, the prosecutor's reference to the inadmissible juvenile offense was improper, it is not governed by Article 770 (requiring mistrial) but rather by Article 771. The latter provision permits an admonition to the jury to cure the prejudice, providing that the trial court is satisfied that an admonition rather than mistrial is sufficient to assure the defendant a fair trial.

We find no abuse of the trial court's discretion in denying a mistrial:

As noted, the trial court sustained the objection to the question and promptly admonished the jury to disregard it. The question concerned a single non-violent petty offense of a juvenile. As permitted by La.R.S. 15:495, the jury additionally received evidence of the defendant's conviction of two post-juvenile crimes, for purposes limited to impeaching credibility.

The admonition of the trial court to disregard the question cured, in our opinion, whatever additional prejudice the accused might otherwise have sustained by the question's inference that he had also been convicted of a petty offense while still a juvenile.

Assignment 15: Denial of pre-trial oyer of pistol and bullet

[3] At the trial, the pistol found in the vicinity was, by ballistic tests, identified as the weapon which fired the

bullet which killed Officer McInerney and which was found in his body.

By pre-trial motion, the accused had sought oyer of the pistol and bullet for the purpose of making ballistic tests. The trial court denied the motion on the authority of *State* v. *Barnard*, 287 So.2d 770 (La.1973). However, subsequent to the trial, the federal courts have set aside the *Barnard* conviction. The federal Fifth Circuit held that the denial of pre-trial ballistic tests, under the circumstances there shown, was a denial of the right to a fair trial and adequate preparation of a defense required by federal due process. *Barnard* v. *Henderson*, 514 F.2d 744 (CA 5, 1975).

In *Barnard*, a pistol was used in the murder. The unknown killer left the scene with the weapon. Subsequently, a pistol was located in Illinois which had there been sold by the defendant. Ballistic tests identified the slug found in the victim as having been fired by that pistol.

In *Barnard*, the issue thus was whether a pistol, identified as the defendant's and in his possession after the shooting, had fired the fatal bullet. Due process fair-trial requirements were held to have been violated by the denial, upon request, of pre-trial access for purpose of completing difficult ballistic testing.

In the recent case, however, the ballistic testing is not shown to have been useful for the accused's defense. The accused's defense did not deny that the pistol found in the alley nearby the shooting had fired the fatal shot. His contention, rather, was that he himself had no connection with the pistol which had been so used.

We are unwilling to reverse a conviction because of the denial of opportunity for pre-trial ballistic testing where, under the circumstances of the actual case, such ballistic testing is not shown to have been relevant to any issue of the accused's defense. Even if it were error to have denied the pre-trial testing to the defendant, the denial is not claimed nor shown to have caused him any prejudice in the preparation of his defense under the particular issues of the present prosecution.

Assignment 17: Voir dire examination of prospective jurors as to their attitudes on the death penalty

La.C.Cr.P. art. 798(2) (1968) provides that the State may challenge for cause any prospective juror in a capital case who "makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt."

Before the 1968 amendment so limiting the state's right to challenge for cause, the State had been entitled to challenge for cause additionally any prospective juror in a capital case who merely had "conscientious scruples against the infliction of capital punishment." La.C.Cr.P. art. 798(2) (1966). The United States Supreme Court had previously held that exclusion of jurors with merely conscientious scruples against capital punishment deprived an accused in a capital case of the jury representative of the community to which he is constitutionally entitled. *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

In the instant case, the trial court sustained the State's challenges for cause as against twenty-five veniremen who expressed fixed opposition to imposition of the death penalty under any circumstances.

[4] The defendant contends that two of them (Halphen and Blazio) did not make their opposition to the death penalty unmistakably clear, so as to entitle the State to challenge them for cause. However, we have reviewed their voir dire examinations and find no error in the trial court's determination that, despite some initial ambiguity, the ultimate firm conclusion of the respective veniremen was that they would not impose the death penalty in the instant case under any circumstances.

[5] Additionally, the defendant argues that the removal from a jury service of twenty-five veniremen opposed to the death penalty deprived him of the jury

representative of the people to which an accused is constitutionally entitled. He points out that, under rulings of this court, a jury is not concerned with the penalty imposed for a conviction but only with whether the facts it finds proved to fit the statutory definition of the crime for which convicted. *State* v. *Selman*, 300 So.2d 467 (La.1974); *State* v. *Blackwell*, 298 So.2d 798 (La.1974). Thus, he contends, to permit challenge for cause of a venireman because of his views about a statutory penalty is arbitrarily to exclude him from the trial jury for no reason related to his function as a juror.

Nevertheless, despite these persuasively-urged contentions, by La.C.Cr.P. art. 798(2) our legislature has permitted exclusion for cause of those prospective jurors who will under no circumstances impose a death penalty mandatorily required when an accused is found guilty of the criminal conduct with which charged.[1]

In *Witherspoon*, the United States Supreme Court recognized that there is no constitutional bar to excluding from jury service those who will in no circumstances concur in a verdict of guilt because of their refusal to apply the extreme penalty required by statute upon conviction.

We do not find error presented by this assignment.

Other Errors Assigned

The other assignments of error are clearly without merit.

For the most part, they concern evidentiary rulings patently correct: Assignment 1 (question at pre-trial motion properly held irrelevant); Assignment 3 (question at pre-trial hearing properly held not to call for a legal conclusion); Assignment 6 (qualified medical expert properly held competent to testify concerning the path of the bullet through the victim's body); Assignments 7, 8, 9 (blood, firearms, and fingerprint witnesses

[1] Further, as perhaps recognized by this statute, in capital cases the jury has been charged as to the capital consequences of its verdict, and counsel have been permitted to argue this extreme penalty. No decision of this court has intimated that this is not appropriate.

properly held qualified as experts); Assignment 10 (coroner's report and proces verbal properly held admissible); Assignment 11 (physical evidence and photographs admitted after proper foundation; defendant assigns no reason to the contrary); and Assignment 14 (miscellaneous rulings sustaining or overruling objections to four minor evidentiary matters correctly admitted or denied admissibility).

The motion for a directed verdict also was properly denied (Assignment 12). Among other reasons, the state's eyewitness testimony identified the defendant as the killer of the police officer.

Likewise, no merit is possessed by the assignments attacking certain trial court's rulings on constitutional grounds:

[6] *Assignments 2 and 5 (Motion to suppress identification)*: Officer Tobin, who was shot at almost point-blank range, identified the defendant as the man who had shot both him and the decedent. The police witness is shown to have had full opportunity to observe and identify his attacker.

The motion to suppress his identification as tainted is based upon the chance passing at Charity Hospital emergency room of the two wounded men, Officer Tobin and the defendant Roberts. When the policeman saw the other, he at once remarked, "That's the man who shot me. I'll never forget his face."

No showing whatsoever is made that the face-to-face encounter at the hospital was pre-arranged or that it in any way was intended or did influence the officer's ability to identify Roberts as his assailant, which was independently based on their actual encounter at the time of the shooting.

[7] *Assignment 4 (Motion to suppress revolver)*: The revolver used in the shooting was found in an alley. It was just outside the house in which the defendant had taken refuge after the shooting incident.

The motion to suppress the weapon is based on the contention that it was seized as the product of a warrantless search in the absence of probable cause. For many reasons, the motion is without merit, including: The

police officers looking for the wounded perpetrator of a murder committed minutes before, were entitled to follow a bloody residue into an alley within a block of the murder and to pick up an abandoned pistol in plain view in the alley. See, e.g., *State* v. *Nine*, 315 So.2d 667 (La.1975).

[8] *Assignment 16 (Motion to quash on grounds of unconstitutionality)*: We have rejected similar attacks upon the constitutionality of the death penalty provided for first degree murder, La.R.S. 14:30, as enacted by Act 109 of 1973. See, e.g., *State* v. *Hill*, 297 So.2d 660 (La.1974).

Decree

For the reasons assigned, we affirm the conviction and death penalty.

AFFIRMED.

SUMMERS, J., concurs and assigns reasons.

CALOGERO, J., concurs, having reservations as to the majority's treatment of bill No. 13.

DIXON, J., dissents from the ruling on the constitutionality of the death penalty under United States Supreme Court standards, but otherwise subscribes fully to the opinion.

SUMMERS, Justice (concurring).

I concur in the result of this opinion because I cannot approve the rejection of a number of contentions by the Court when no reasons are assigned therefor in this death penalty case.

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SUPREME COURT OF THE UNITED STATES

No. 76-5206

HARRY ROBERTS, PETITIONER

v.

LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Louisiana.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 8, 1976

SUPREME COURT OF THE UNITED STATES

No. 76-5206

HARRY ROBERTS, PETITIONER

v.

LOUISIANA

ON WRIT OF CERTIORARI to the Supreme Court of the State of Louisiana.

The petition for a writ of certiorari having been granted on November 8, 1976, the grant is hereby limited to the following question:

> "Whether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States."

November 29, 1976

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